No. 17-1369

# United States Court of Appeals for the Federal Circuit

IDENIX PHARMACEUTICALS LLC, UNIVERSITA DEGLI STUDI DI CAGLIARI, CENTRE NATIONAL DE LA RECHERCHE SCIENTIFIQUE, UNIVERSITE DE MONTPELLIER,
*Plaintiffs-Appellants*,

*v.*

GILEAD PHARMASSET LLC,
*Defendant-Appellee*.

**Appeal from the United States District Court for the District of Delaware in No. 1:15-cv-00416-LPS-CJB, Judge Leonard P. Stark**

**APPELLANTS' UNOPPOSED MOTION TO STAY**

## INTRODUCTION

Pursuant to Federal Rule of Appellate Procedure 27 and this Court's Rule 27, appellants Idenix Pharmaceuticals LLC, Universita Degli Studi di Cagliari, Centre National de la Recherche Scientifique, and Université de Montpellier (collectively, "Idenix") move, unopposed, to stay the briefing schedule in this appeal. The question presented in this appeal is also presented in pending Appeal No. 2015-1802 ("*Idenix I*"): whether the district court, instead of this Court, has jurisdiction over Idenix's challenge to decisions in a PTO interference involving a pre-AIA patent. *Idenix I* has already been briefed and argued to this Court. The parties agree that staying the present appeal pending a decision in *Idenix I* is the most prudent course.

## BACKGROUND

This appeal generally relates to patents and patent applications owned by Idenix or appellee Gilead Pharmasset LLC ("Gilead") that are directed towards methods for the treatment of hepatitis C virus infection. In December 2013, the PTO declared an interference between claims of Idenix's U.S. Patent No. 7,608,800 ("the '600 patent") and Gilead's U.S. Patent Application No. 11/854,218. The '600 patent is a pre-AIA patent. The PTO entered judgment on priority against Idenix in March 2015.

In May 2015, Idenix sought review of the PTO's unfavorable rulings. At that time, a panel of this court had just held in *Biogen MA, Inc. v. Japanese Foundation for Cancer Research,* that, for interferences declared after September 15, 2012, district-court review under 35 U.S.C. § 146 "is not available"; instead, review is had by direct appeal to this Court under § 141. 785 F.3d 647, 654 (Fed. Cir. 2015). To protect its rights while the *Biogen* decision was subject to further review by this Court and the Supreme Court, and to challenge the *Biogen* decision's reading of the Patent Act, Idenix filed both a §141 notice of direct appeal to this Court—the *Idenix I* appeal—and a §146 complaint in the U.S. District Court for the District of Delaware—"*Idenix II*." The *Idenix I* appeal has proceeded through briefing and argument, which occurred on September 7, 2016, before Chief Judge Prost and Judges Newman and Dyk. In *Idenix I*, Idenix respectfully asked this Court, *inter alia*, to correct *Biogen*'s reading and direct that Idenix was entitled to challenge the PTO's rulings by electing district-court review under § 146 rather than a direct appeal to this Court under § 141. A decision in *Idenix I* is pending.

Meanwhile, in *Idenix II*, Gilead moved to dismiss the §146 action for lack of jurisdiction in view of the *Biogen* decision. In July 2016, the Magistrate Judge filed a report and recommendation recommending Gilead's motion be granted. In November 2016, the district court adopted the report and recommendation in full, and Idenix timely appealed. This is Idenix's appeal of that decision in *Idenix II*. Idenix's opening brief is currently due on February 17, 2017.

## ARGUMENT

The parties agree that this Court should stay the briefing schedule in this appeal while a decision in *Idenix I* remains pending. The issue in this appeal relates to whether Idenix may elect §146 district-court review of the PTO's rulings in an interference involving a pre-AIA patent rather than a direct appeal to this Court under § 141. That same question is presented by *Idenix I*, currently under consideration. It would thus be inefficient to brief this appeal at this time.

The Court has inherent authority to stay appeals on its docket, *see Landis v. North Am. Co.*, 299 U.S. 248, 254 (1936), and it "routinely" grants motions to stay briefing in light of another pending appeal that presents the same or similar legal issues. *Carpenter v. U.S. Postal Serv.*, 73 F.3d 375 (Table), 1995 WL 656804, at *1 n.* (Fed. Cir. Oct. 23, 1995) (this Court "routinely granted all such motions" pending its final disposition of another pending appeal); *see also, e.g.*, *Reizler v. Allen*, 388 F. App'x 970 (Fed. Cir. 2010) (staying briefing "pending disposition of a related appeal"); *Blanco v. United States*, 85 F. App'x 736 (Fed. Cir. 2003) (noting the Court's stay of the appeal until resolution of two other appeals presenting the same issue).

## CONCLUSION

Idenix respectfully requests a stay while a decision in *Idenix I* is pending.

## STATEMENT OF CONSENT

Counsel for Idenix has discussed this motion with Gilead. Gilead has stated that it agrees with the stay request.

Dated: February 2, 2017

Respectfully submitted,

/s/ Jennifer L. Swize

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## CERTIFICATE OF INTEREST

Pursuant to Federal Circuit Rule 47.4, counsel for Plaintiffs-Appellants certifies as follows:

1. Full name of party represented by me:

Idenix Pharmaceuticals LLC, Universita Degli Studi di Cagliari, Centre National de la Recherche Scientifique, and Universite de Montpellier

2. Name of real party in interest (please only include any real party in interest NOT identified in Question 3) represented by me is:

N/A

3. Parent corporations and any publicly held companies that own 10% or more of stock in the party:

Merck & Co., Inc. is the parent company of Idenix Pharmaceuticals LLC.

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court (and who have not or will not enter an appearance in this case) are:

**Jones Day:** Ryan B. McCrum, Thomas E. Friebel, John M. Michalik, Michael S. Weinstein.

**Ashby Geddes:** Steven J. Balick, John G. Day, Andrew C. Mayo.

## CERTIFICATE OF SERVICE

I hereby certify that on February 2, 2017, I served a copy of the foregoing on all counsel of record by CM/ECF.

*/s/ Jennifer L. Swize*
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